IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3321 OF 2004

Ashok Kumar Jalan ..Petitioner.

Vs.

The Industrial Financial Corporation Limited & Ors. .. Respondents.

....

Mr. J.P. Sen i/b M/s. Mehta & Girdharlal for the petitioner.
Mr. Shyam Diwan i/b M/s. Shaunak Satpute & Co. for respondent No.1.

....

CORAM : DALVEER BHANDARI, C.J.&
DR.D.Y.CHANDRACHUD, J.

21st December, 2004.

P.C. :

1. This petition under Article 226 takes exception to an order passed by the Debt Recovery Appellate Tribunal on 28th October, 2004. The Appellate Tribunal by its order dismissed an appeal against an order dated 30th July, 2004 passed by the Presiding Officer of Debt Recovery Tribunal – II at Mumbai. The First Respondent has instituted proceedings against the Petitioner as a guarantor in respect of credit facilities extended to Elphinstone Spinning and Weaving Mills Company Limited. The management of the textile undertaking of the aforesaid company was taken over

by the Central Government under the provisions of the Textile Undertaking (Takeover of Management) Act, 1983. On 1st April, 1994, the textile undertaking of the company was vested in the Central Government free of encumbrances under the Textile Undertakings (Nationalization) Act, 1995.

2. The First Respondent instituted proceedings against the Petitioner on the basis of the guarantee executed by the Petitioner. The proceedings before the Tribunal were instituted in the year 2000. In January 2002 the Petitioner moved an application before the Tribunal seeking the following reliefs :

> "a) Having regard to the provisions of the Textile Undertakings (Nationalization) Act, 1995 (39 of 1995) the preliminary issue viz. whether the Applicant is entitled to proceed with the Original Application be framed.
>
> b) That pending the hearing and final disposal of the application, the hearing of the original application be stayed."

3. On the aforesaid application an order was passed by the Presiding Officer of the Debt Recovery Tribunal – II on 14th March, 2002 recording that by consent the application would be heard together with the original application filed by the First Respondent

for the recovery of its dues. Parties were accordingly directed to lead evidence. The Petitioner thereafter filed another application in August 2003 seeking the following reliefs :

> "a) Having regard to the provisions of the Textile Undertakings (Nationalization) Act, 1995 the preliminary issues whether the Applicant is entitled to proceed with the Original Application be framed.
>
> b) that further proceedings in the Original Application be stayed pending adjudication by the Commissioner of Payments of the claim of the Applicant Bank."

4. In its reply to the application, the First Respondent submitted that the nationalization of the unit under the Textile Undertakings (Nationalization) Act, 1995 did not affect the obligation of the Petitioner as guarantor and reliance was sought to be placed on Clause 15 of the Deed of Guarantee which was in the following terms :

> "The Guarantee contained in this deed shall in all respects and for all purposes be continuing guarantee and shall not be considered as wholly or partially satisfied or exhausted by any payments made to or settled with the Corporation by the Company and shall be binding and operative until repayment in full of all the moneys due to the Corporation as aforesaid. This guarantee shall also continue to be in force notwithstanding any change in the management of the Company or taking over of the management of the Company

> by the Central/State Government or by any authority or by acquisition or nationalization of Company and/or its undertaking pursuant to any law".

5. Besides it was stated that though the First Respondent had submitted a claim against Elphinstone Mills with the Commissioner of Payments appointed under the Nationalization Act, the First Respondent shall refund any amount that may be received on the adjudication of the First Respondent's claim before the Commissioner of Payments.

6. The application was dismissed on 30th July, 2004 and that order has been confirmed in appeal on 28th October, 2002.

7. As we have already noted earlier, the first application that was filed by the Petitioner in the month of January 2002 sought the framing of a preliminary issue of whether the First Respondent herein was entitled to proceed with the application before the Debt Recovery Tribunal having regard to the provisions of the Textile Undertakings (Nationalization) Act, 1995. The Tribunal passed an order thereon with the consent of parties to the effect that the application would be heard together with the main/original

application that was filed by the First Respondent and accordingly parties were directed to lead their evidence. Notwithstanding the aforesaid order which was passed on 14th March, 2002 with the consent of parties, a fresh application was taken out by the Petitioner in August, 2003. Prayer clause (a) of the subsequent application is identical to prayer clause (a) of the earlier application. The only difference was that in prayer (b) of the subsequent application further proceedings before the Tribunal were sought to be stayed pending an adjudication by the Commissioner of Payments of the claim of the First Respondent Bank. We are of the view that the subsequent application was clearly an abuse of the process and it is apparent that the only object was to delay the proceedings before the Debt Recovery Tribunal. Despite the earlier order of the Tribunal, the Petitioner pressed ahead with the hearing of the subsequent application. The Presiding Officer of the Tribunal was, therefore, justified in dealing with the merits of the application and in arriving at a finding thereon. We have also considered the merits of the decision of the Tribunal which has been affirmed in appeal. We are of the view that the conclusion which has been arrived at by the Tribunal is entirely in consonance with the judgments of the Supreme Court in **Industrial Finance**

Corporation of India Limited v. Cannanore Spinning and Weaving Mills Ltd. ((2002) 5 SCC 54) and **Punjab National Bank v. State of U.P** ((2002) 5 SCC 80).

8. The decision of the Supreme Court in **Punjab National Bank** (supra) which was rendered on 16th January, 2001 is of a Bench of three Learned Judges. In the subsequent decision in **Industrial Finance Corporation of India** (Supra) a Bench of two Learned Judges followed the earlier decision of the Bench of three Learned Judges of the Supreme Court. While construing the provisions of Section 5 of the Sick Textile Undertakings (Nationalization) Act, 1974, the Supreme Court held that the Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by him. The Court held that the right of the bank to recover money from the guarantors arose out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught, because the bank may not have been able to recover money from the principal borrower. Even as a result of the Nationalization Act, the liability of the principal borrower does not come to an end and it is

only the mode of recovery which is referred to in the Act. The earlier decision was followed subsequently in the **Industrial Finance Corporation of India** (supra). The Supreme Court held that a contract of guarantee is not a contract regarding a primary transaction but that it is an independent transaction containing independent and reciprocal obligations. Construing the provisions of the Sick Textile Undertakings (Nationalization) Act, 1974, the Supreme Court held thus:

> "Turning attention to the effect of the Sick Textile Undertakings (Nationalization) Act, 1974, a bare perusal of some of the provisions will indicate that there is no discharge of the liability of principal debtor, leave alone that of the surety. Sections 3, 4, 5 and 20 of the Act of 1974, if read together, would depict that the liability of the owner of the undertaking/ the debtor continues and it is only the claim against the security which stands discharged by reason of the statutory shift of the charge on to the compensation. The liability of the principal debtor does not in any way come to an end, neither that of the guarantor."

9. Learned counsel appearing on behalf of the Petitioner has fairly conceded that these principles which have been laid down by the Supreme Court in the context of the Nationalization Act of 1974, which is pari materia, must apply in this case as well, on the construction of the Act of 1995. The principle which has been laid

down by the Supreme Court to the effect that the independent obligation created under a contract of guarantee would not stand extinguished as a result of the Nationalization Act, must equally apply to this case. Moreover, we have already recorded the statement made in the reply filed by the First Respondent before the Debt Recovery Tribunal that the First Respondent " shall refund the amount if any amount is received on adjudication of the Applicants claim before the Commissioner of Payments". The First Respondent has also stated that it is "ready to give up the claim in favour of the Defendant and let the Defendant step in the shoes of the Applicant to receive the Claim from the Commissioner of Payments". Having regard to the law laid down by the Supreme Court, the First Respondent which has filed a proceeding against the Petitioner on the basis of an independent contract of guarantee cannot be restrained from proceeding ahead with the matter before the Tribunal. The proceeding before the Tribunal is competent and the conclusion which has been arrived at by the Tribunal does not warrant any interference.

10. The Petition is accordingly dismissed.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.